STATE OF MICHIGAN

COURT OF APPEALS

GRAND SKY ENTERPRISE COMPANY, LTD.,

Plaintiff-Appellant,

v

FUTURE FINANCIAL INVESTMENTS, LLC,

Defendant-Appellee,

and

ROMEL CASAB,

Defendant,

and

HENRY M. NIRENBERG, Receiver,

Appellee.

UNPUBLISHED
February 11, 2021

No. 351467
Oakland Circuit Court
LC No. 2010-112097-CK

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

PER CURIAM.

In this action for breach of contract and fraud, plaintiff recovered a judgment against defendant in 2011 in the amount of $3,464,767.91.[1] In postjudgment collection proceedings, Henry Nirenberg was appointed as receiver, but was unable to recover any assets. The receivership was closed in 2012. In 2018, plaintiff again moved for appointment of a receiver and requested that the trial court appoint David Findling. The court granted plaintiff's motion, but again

[1] This Court affirmed that judgment in 2013. *Grand Sky Enterprise Co v Future Fin Investments*, unpublished per curiam opinion of the Court of Appeals, issued March 19, 2013 (Docket No. 307851).

appointed Nirenberg as receiver instead of Findling. In 2019, the receivership was again closed after Nirenberg was unable to locate any collectible assets. Nirenberg moved for approval of his final report and asked that plaintiff be directed to pay Nirenberg's fees and expenses. The trial court granted the motion and directed plaintiff to pay Nirenberg's fees and expenses in the amount of $34,544.39. Plaintiff appeals as of right, and we affirm.

I. MCR 2.622(B)(1) AND (5)

Plaintiff first argues that the trial court erred by appointing Nirenberg as receiver in 2018 without following the requirements of MCR 2.622(B)(1) and (5). We disagree. We review de novo as a question of law whether the trial court properly applied and satisfied the requirements of MCR 2.622(B)(1) and (5). *In re Capuzzi Estate*, 470 Mich 399, 402; 684 NW2d 677 (2004).

Plaintiff argues that the trial court erred by appointing Nirenberg as receiver when plaintiff had nominated Findling, who was qualified to serve and defendants did not object to Findling's selection as receiver. MCR 2.622(A) provides that, "[u]pon the motion of a party or on its own initiative, and for good cause shown, the court may appoint a receiver as provided by law." Plaintiff argues that the trial court failed to comply with MCR 2.622(B)(1), which provides:

> **(B) Selection of Receiver.** If the court determines there is good cause to appoint a receiver, the court shall select the receiver in accordance with this subrule. Every receiver selected by the court must have sufficient competence, qualifications, and experience to administer the receivership estate.
>
> (1) *Stipulated Receiver or No Objection Raised*. The moving party may request, or the parties may stipulate to, the selection of a receiver. The moving party shall describe how the nominated receiver meets the requirement in subsection (B) that a receiver selected by the court have sufficient competence, qualifications, and experience to administer the receivership estate, considering the factors listed in subsection (B)(5). If the nonmoving party does not file an objection to the moving party's nominated receiver within 14 days after the petition or motion is served, or if the parties stipulate to the selection of a receiver, the court shall appoint the receiver nominated by the party or parties, unless the court finds that a different receiver should be appointed.

In *Casa Bella Landscaping, LLC v Lee*, 315 Mich App 506, 509-511; 890 NW2d 875 (2016), this Court held that when a trial court does not appoint the receiver nominated by a party or parties, it must state its reasons why the person nominated is not qualified or why a different receiver should be appointed. This Court explained:

> The rule provides that if the nonmoving party does not object or the parties stipulate the selection of a receiver, then "the court *shall* appoint the receiver nominated by the party or parties, unless the court finds that a different receiver should be appointed." MCR 2.622(B)(1) (emphasis added). In order to "find" that a different receiver should be appointed, the trial court must first find that the nominated receiver, as to whom there has been no objection, is not qualified to serve as a receiver or should not be appointed for some other grounds articulated

with specificity and supported by record evidence. A contrary interpretation would grant the trial court unfettered discretion to disregard the nomination of a qualified receiver, which is plainly inconsistent with the rule's provision that "the court shall appoint the receiver nominated by the party or parties . . . ." Court rules, like statutes, must be read to give every word effect and to "avoid an interpretation that would render any part of the [court rule] surplusage or nugatory." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted).

The trial court made no findings that Findling was not qualified to serve as a receiver. Instead, when questioned about its rationale for not appointing Findling, the court merely stated that it "won't use them." The court's conclusory statement wholly fails to satisfy the requirement that the court appoint the nominated receiver unless it finds that a different receiver should be appointed.

The trial court also failed to follow MCR 2.622(B)(5), which applies when the trial court appoints a receiver other than one nominated by a party under MCR 2.622(B)(1). The rule provides:

> If . . . the court makes an initial determination that a different receiver should be appointed than the receiver nominated by a party under subsection (B)(1), the court shall state its rationale for selecting a particular receiver after considering the following factors:
>
> (a) experience in the operation and/or liquidation of the type of assets to be administered;
>
> (b) relevant business, legal and receivership knowledge, if any;
>
> (c) ability to obtain the required bonding if more than a nominal bond is required;
>
> (d) any objections to any receiver considered for appointment;
>
> (e) whether the receiver considered for appointment is disqualified under subrule (B)(6); and
>
> (f) any other factor the court deems appropriate. [MCR 2.622(B)(5).]

Assuming arguendo that the trial court correctly found that Findling was unqualified and that a different receiver should be appointed, the trial court made insufficient findings to support its selection of Smith as receiver. It did not refer to the factors set forth in MCR 2.622(B)(5) and did not "state its rationale for selecting a particular receiver . . . ." MCR 2.622(B)(5). The trial court merely stated in conclusory terms that Smith was in the bar journal, had a sole receivership practice,

> and did a lot of work for banks. The trial court's rationale for selecting Smith was insufficient and inconsistent with the rule.
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> In sum, the trial court did not comply with MCR 2.622(B)(1) because it failed to make and support findings that Findling was unqualified. It also did not comply with MCR 2.622(B)(5), because it failed to state its rationale for appointing Smith after considering the enumerated factors. We therefore vacate the trial court's order appointing Smith as receiver and remand to the trial court for further proceedings.

In this case, although defendants filed objections to plaintiff's request to appoint a receiver, defendants did not specifically object to Findling's nomination as receiver should a receiver be appointed. Further, after the court appointed Nirenberg as the receiver, defendants again did not object. Rather, only plaintiff contested that selection in its motion for reconsideration. Even if MCR 2.622(B)(1) was applicable because plaintiff nominated Findling as receiver and defendants did not object to that selection, MCR 2.622(B)(1) still allowed the trial court to appoint a different receiver if it found that Findling, the nominated receiver, either was "not qualified to serve as a receiver *or* should not be appointed for some other grounds articulated with specificity and supported by record evidence." *Casa Bella Landscaping*, 315 Mich App at 509 (emphasis added). The trial court did not find that Findling was not qualified to serve as receiver, but it explained why a different receiver should be appointed. Specifically, the court stated that Nirenberg should be appointed as receiver because he too was qualified, and more significantly, he had previously served as a receiver in this matter, and thus was familiar with the parties and the case.

Contrary to what plaintiff argues, MCR 2.622(B)(1) did not compel the trial court to appoint the receiver nominated by plaintiff. Further, we disagree with plaintiff's argument that the trial court failed to comply with MCR 2.622(B)(5) when it appointed Nirenberg, instead of Findling, as the receiver. MCR 2.622(B)(5) provides:

> If a party objects under subsection (B)(2) or the court makes an initial determination that a different receiver should be appointed than the receiver nominated by a party under subsection (B)(1), the court shall state its rationale for selecting a particular receiver after considering the following factors:
>
> (a) experience in the operation and/or liquidation of the type of assets to be administered;
>
> (b) relevant business, legal and receivership knowledge, if any;
>
> (c) ability to obtain the required bonding if more than a nominal bond is required;
>
> (d) any objections to any receiver considered for appointment;

(e) whether the receiver considered for appointment is disqualified under subrule (B)(6)[2]; and

(f) any other factor the court deems appropriate.

Plaintiff complains that the trial court failed to address each of the factors in Subrule (B)(5) before appointing Nirenberg as receiver. However, the rule only requires the trial court to "state its rationale for selecting a particular receiver." Although the court rule also requires the court to consider various listed factors in selecting a particular receiver, it does not require the court to state its findings regarding each listed factor. In this case, the trial court stated its rationale for appointing Nirenberg over Findling. The court explained that it was appointing Nirenberg as receiver because he previously served as a receiver in the case, he was an appropriate selection then, and he remained an appropriate receiver in 2018. This rationale reflects the trial court's determinations that Nirenberg was qualified to act as a receiver considering his experience and the type of case at hand, which are relevant to factors (a) and (b), and that Nirenberg was a preferred selection over Findling because of Nirenberg's prior familiarity and experience with the parties and the case, which is relevant to factor (f). Moreover, there was no contention that Nirenberg was unable to obtain any required bonding, or that Nirenberg was disqualified to act as a receiver under Subrule (B)(6). Plaintiff did not initially object to Nirenberg's appointment as receiver, but then contested that appointment in a motion for reconsideration. In denying that motion, the trial court further explained its rationale for appointing Nirenberg over Findling, stating:

> MCR 2.622 clearly allows this Court to appoint a different receiver and *Casa Bella Landscaping*, *supra* only requires this Court to articulate its grounds. Plaintiff failed to attach a copy of the transcript form [sic, from] the July 11, 2018 oral argument. With that stated, this Court finds that it did articulate with specificity and supported by record evidence why it selected Henry Nirenberg over David Findling. Specifically, this Court acknowledged that it previously appointed Henry Nirenberg as the receiver in 2012; the receivership was placed on administrative hold while Defendant Roman Casab pursued discharge of this debt through bankruptcy; and it found that Henry Nirenberg was an appropriate receiver then and is still an appropriate receiver now. As such, this Court finds that plaintiff failed to demonstrate that this Court made a ***palpable*** error such that a different disposition of the matter is required.

Plaintiff argues that the trial court erroneously stated that the case had been placed on administrative hold during Casab's bankruptcy proceeding. The record shows that on July 19, 2012, Nirenberg wrote to the parties and the court to advise that Casab's bankruptcy filing had resulted in a stay of this matter. Although the receivership was later terminated, the trial court did not err by noting that when Nirenberg first acted as receiver, a stay was issued after the filing of Casab's bankruptcy petition.

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[2] Subrule (B)(6) addresses various situations in which a person is disqualified from acting as a receiver due to a conflict of interest. There is no contention that Nirenberg was disqualified under this subrule.

In sum, the record discloses that the trial court complied with the requirements of MCR 2.622(B)(1) and (5) and sufficiently stated its rationale for appointing Nirenberg as receiver instead of Findling.

II. THE RECEIVER'S COMPENSATION

Plaintiff also argues that the trial court erred by holding it liable for Nirenberg's fees and expenses. The amount of compensation to be awarded to a receiver is generally reviewed for an abuse of discretion. *Band v Livonia Assoc*, 176 Mich App 95, 110-111; 439 NW2d 285 (1989). However, whether a trial court has authority to order a party to pay the fees and costs of a receivership is a question of law, which we review de novo. *Attica Hydraulic Exch v Seslar*, 264 Mich App 577, 588; 691 NW2d 802 (2004).

Plaintiff does not dispute that Nirenberg was unable to locate any collectible assets during his first appointment as receiver, which terminated in 2012, or that plaintiff again moved for appointment of a receiver in 2018, and that Nirenberg was again unable to locate any collectible assets during his second appointment as a receiver. Plaintiff also does not dispute that there is no receivership income or assets from which Nirenberg's fees and expenses can be paid.

MCR 2.622(F)(1) provides that a receiver is entitled to reasonable compensation for services rendered. The order appointing the receiver must set forth the source and method of compensating the receiver. MCR 2.622(F)(2)(a). The order must also provide that a receiver's requested compensation is subject to final review and approval of the trial court. MCR 2.622(F)(2)(c). Under MCR 2.622(F)(3), "[a]ll approved fees and expenses incurred by a receiver, including fees and expenses for persons or entities retained by the receiver, shall be paid or reimbursed as provided in the order appointing the receiver."

MCR 2.622 was amended in 2014 and the amended rule applies to Nirenberg's 2018 appointment. Before the rule was amended, MCR 2.622(D) provided that when a receivership is terminated without the receiver recovering any funds,

> the court, on application of the receiver, may set the receiver's compensation and the fees of the receiver's attorney for the services rendered, and *may direct the party who moved for the appointment of the receiver* to pay these sums in addition to the necessary expenditures of the receiver. [*Attica Hydraulic Exchange*, 264 Mich App at 591.]

Plaintiff argues that because the current version of MCR 2.622(D) does not specifically allow a trial court to require the moving party to pay the receiver's compensation when there are insufficient funds in the receivership estate, the trial court was not permitted to order it to pay for any portion of Nirenberg's fees and expenses. We disagree.

The rule in the former version of MCR 2.622(D) is based on the common law. In *Fisk v Fisk*, 333 Mich 513, 516-517; 53 NW2d 356 (1952), the Court explained that if there are insufficient funds in a receivership estate to pay the receiver's fees, the party requesting appointment of the receiver or a party benefiting from the appointment may be required to pay the receiver's fees:

> In a case such as this, the primary purpose of a receivership is to preserve and protect the property involved in the controversy. This being so it logically follows that he who ultimately establishes his right to the property thus held is the one who benefits from the property having been protected and preserved. *Bailey v Bailey*, 262 Mich 215 [(1933)]. For this reason the general rule followed by the courts is that "a receiver's compensation and the expenses necessarily incurred by him in preserving and caring for the property under the order of a court of competent jurisdiction are primarily a charge on and should be paid out of the fund or property in his hands, regardless of the ultimate outcome of the principal suit . . . ." 75 CJS, § 302a, p 978. An exception to this general rule is made in cases where the court which appointed the receiver had no jurisdiction to do so, and, also, in some cases where although the court had jurisdiction it was improper or improvident to appoint a receiver. In the instant case the parties agreed by stipulation to the appointment of C. D. Fisk and W. F. Schuett as receivers, and by doing so appellant in effect waived any complaint he might otherwise make regarding the propriety or legality of the appointment and its effect upon the question of who was to bear the receivership expenses. See *Hertz v Knudson* (CCA), 6 F2d 812; *Bowersock Mills & Power Co v Joyce*, (CCA), 101 F2d 1000. Since appellant agreed to the appointment of the receivers his challenge of the right of one of them to a reasonable compensation for his services as such, as a charge against the property held by the receivers, cannot prevail.

Although MCR 2.622(F), as amended, no longer expressly provides that the party requesting the receiver may be required to pay the receiver's fees and expense, it directs that a receiver is entitled to compensation for services rendered to the receivership estate, contemplates that such compensation may come from a source other than the receivership estate, and does not preclude the court from directing that such compensation be made by a party who requested the receiver's appointment. The rule requires that the appointment order specify the source and method of compensation of the receiver. The trial court's appointment order in this case met this requirement. The order directed that Nirenberg was to be compensated first from any income from receivership property and then from receivership assets if the income was insufficient to pay the receiver's compensation. The order further provided::

> If there is insufficient funds to pay the Receiver's fees and expenses, Receiver may petition the court to determine the compensation to be paid and to decide which party (including any additional parties added to this case) will be responsible for the payment of, and the portion of its responsibility, the compensation. Until further order from this Court, the Receiver shall receive compensation at the rate of $350.00 per hour for his services, $275.00 - $300.00 per hour for Associates, and $100.00 - $160.00 per hour for the services of paralegals. The Receiver shall also be entitled to be reimbursed for reasonable out-of-pocket expenses related to the performance of its duties as Receiver. The Receiver shall issue invoices to the parties to this action on a monthly basis. The Receiver may receive payment on a monthly basis, without further Court Order, provided no objections are filed with the Receiver within fifteen (15) days after such invoices are sent by electronic mail to all the parties. In the event an objection is timely filed, the objecting party shall

> file a motion with this Court within seven (7) days after objecting to determine the propriety of the fees sought, or its objections will be waived.

Thus, plaintiff was on notice that, as a party to this action, it could be held liable for Nirenberg's compensation if there were insufficient funds in the receivership estate to pay Nirenberg's fees and expenses.

Although plaintiff argues that it should not be held liable for the receiver's compensation because Nirenberg was not the receiver who it requested, MCR 2.622(1) and (5) allowed the trial court to appoint a receiver other than the person nominated by plaintiff, and MCR 2.622(F)(1) entitled the receiver to compensation for services rendered to the receivership estate. Thus, the trial court's appointment of someone other than the person who plaintiff nominated as receiver is not a basis for concluding that plaintiff could not be held responsible for paying the receiver's fees and expenses.

Plaintiff also contends that it should not be held liable for Nirenberg's fees and expenses because Nirenberg did not represent its interests and because he did not benefit the receivership estate, given that no property was recovered or preserved. However, it was plaintiff who requested appointment of a receiver, despite knowing that Casab had filed for bankruptcy and knowing that the previous receivership was terminated because no collectible assets could be located. Moreover, MCR 2.622(F)(1) provides that a receiver is entitled to reasonable compensation "for services rendered to the receivership estate." The rule does not specify that the receiver's services must have benefited the receivership estate. In any event, under MCR 2.622(A), Nirenberg served as "a fiduciary for the benefit of all persons appearing in the action or proceeding." Moreover, we disagree that plaintiff received no benefit from his work. Plaintiff requested the receivership because it believed there were still assets available to seize and apply toward the judgment owed by defendants. Nirenberg's services confirmed that no collectible assets existed. Plaintiff does not contend that Nirenberg failed to locate and seize any identifiable assets, and it does not challenge any of Nirenberg's services as unnecessary.

In sum, the trial court did not err as a matter of law by ruling that plaintiff could be held liable for Nirenberg's fees and expenses as receiver. Further, it was plaintiff who requested appointment of a receiver knowing that it was questionable whether any collectible assets could be recovered, given that Casab had filed for bankruptcy and that the prior receivership had terminated without locating any collectible assets. Plaintiff also knew that a receiver would be entitled to compensation for his services, and the appointment order put plaintiff on notice that it could be held liable for the receiver's compensation if the receivership estate was insufficient to pay the receiver's fees and expenses, which was a known possibility considering the history of the case. The record also indicates that after conducting an initial investigation, Nirenberg notified plaintiff that he was unlikely to recover anything, but plaintiff directed him to continue looking for assets. Under these circumstances, plaintiff has not demonstrated that the trial court erred by holding it liable for the receiver's fees and expenses.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael F. Gadola
/s/ Anica Letica